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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1184

LEONARD WISNIEWSKI,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Leonard Wisniewski,

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United States of America,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Leonard Wisniewski prays that a writ of certeriori issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on February 9, 1972.

Opinion Below

The opinion of the Court of Appeals, as yet unreported, and the order of the Court of Appeals denying the Petition for Rehearing, and, in the alternative, Motion to Stay Mandate are printed in the appendix to this petition (1a, 12a).[1]

[1] References are indicated as follows:

References to the numbered pages of the appendix to this petition (a).

References to the numbered pages of the appendix to Government's brief in the Court of Appeals, for which a request for certification pursuant to Rule 21(1), Supreme Court Rules, has been made (Govt. App. a).

Jurisdiction

The judgment of the Court of Appeals was entered on February 9, 1972. Petitioner's timely petition for rehearing was denied on March 9, 1972 (12a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Did the exclusion of petitioner and his lawyer from the trial judge's examination of jurors during the course of trial deny petitioner the right to be present at every stage of the trial, as guaranteed by the Sixth Amendment and Rule 43, F. R. Cr. P., and the right to assistance of counsel, as guaranteed by the Sixth Amendment?
2. Did the admission of testimony relating to an attempted bribe in the course of trial under the consciousness of guilt doctrine—which testimony formed the basis of a separate obstruction of justice charge of which petitioner was later acquitted—cause petitioner to forfeit his right to testify on his own behalf, as guaranteed by the Sixth Amendment, or forfeit his privilege against self-incrimination, as guaranteed by the Fifth Amendment?

Constitutional and Statutory Provisions Involved

Fifth Amendment

Capital crimes; double jeopardy; self-incrimination; due process; just compensation for property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment

of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment

Jury trial for crimes, and procedural rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Rule 43

Presence of the Defendant

The defendant shall be present at the arraignment, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by these rules. In prosecutions for offenses not punishable by death, the defendant's voluntary absence after the trial has been commenced in his presence shall not prevent continuing the trial to and including the return of the verdict. A corpora-

tion may appear by counsel for all purposes. In prosecutions for offenses punishable by fine or by imprisonment for not more than one year or both, the court, with the written consent of the defendant, may permit arraignment, plea, trial and imposition of sentence in the defendant's absence. The defendant's presence is not required at a reduction of sentence under Rule 35.

Statement

Petitioner faces a five year prison sentence for convictions of three related violations of the extortionate extension of credit act, 18 U.S.C. §§892, 894, after a trial (1) at which both he and his lawyer were excluded from a portion of the proceedings and (2) at which evidence of another, uncharged criminal offense—of which he was later acquitted—was admitted in evidence against him.

By indictment returned in the District of Connecticut, petitioner and co-defendants Marangelli, Palmieri, and Travisano were indicted for making an extortionate extension of credit to two Connecticut businessmen, Messrs. Suli and Secchiaroli, using extortionate means to collect the loan and conspiring to use extortionate means to collect the loan (2a).

At trial before Judge Murphy, of the Southern District of New York sitting in Connecticut by designation, and a jury, the Government offered the testimony of the two persons to whom the credit was extended, Messrs. Suli and Secchiaroli, which was followed by testimony of one Casey on Friday, May 28, 1971, to the effect that petitioner made unsuccessful efforts to extend bribes to the victims who testified for the Government (2a, 7a). The Casey testimony was admitted over petitioner's objection without discussion by the trial court, and justified by the Court of Appeals

"solely as bearing on Wisniewski's consciousness of guilt" (10a).

A newspaper account of the Casey testimony containing highly connotative language that petitioner, on trial for "loan-sharking and extortion counts," was arrested for bribing and threatening a Government witness (Govt. App. 2a), appeared on Saturday, May 29, 1971 (6a).

In the wake of the publication of the newspaper account and petitioner's request for a mistrial, the trial judge conducted an individual interrogation of jurors in the absence of petitioner and his lawyer (8a, 9a). After his *in camera* examination of the jury, Judge Murphy determined that every juror had read the article (Govt. App. 35a-47a), but refused to disclose this fact to defendants (Govt. App. 47a). Instead, he merely announced his conclusion—based on evidence adduced in the absence of petitioner and his lawyer—that "no juror has any prejudice" (Govt. App. 47a).

After conviction, the Court of Appeals affirmed. As to the trial court's unusual procedure of (1) excluding petitioner and his lawyer from the examination of jurors and (2) refusing to disclose to the parties the fact that every juror read the article, the court below noted that the trial judge attempted to cure the potential error, with *one* of the codefendant's consent,

> "by following the practice, see *Marshall* v. *United States*, 360 U.S. 310 (1959); *Coppedge* v. *United States*, 272 F.2d 504 (D.C. Cir. 1959), of interrogating the jurors individually in chambers and on the record, . . ." (8a, 9a).

As to the trial court's admission of the Casey obstruction of justice testimony, the court below stated this was relevant solely to show petitioner's consciousness of guilt (10a).

The court below also observed, without suggestion by the Government, that the loan which was the subject matter of the case was made in the office of petitioner's attorney, "who tried the case and argued this appeal" (3a). Moreover, the Court of Appeals justified the exclusion of petitioner and his lawyer in part with this additional observation:

> ". . . in the atmosphere of intimidation and threats of violence permeating the evidence, *particularly since Wisniewski's lawyer who had handled the original making of the loan was also trial counsel,* the court may well have been concerned with possible juror intimidation" (9a). (Emphasis added.)

After the opinion of the Court of Appeals was filed, petitioner, acting through new counsel, filed a petition for rehearing, emphasizing the points raised in this petition. By brief order, without discussion of the issues, the Court of Appeals denied the petition for rehearing (12a).

At the time the Court of Appeals rendered its decision, on February 9, 1972, the obstruction of justice charge based on the Casey testimony was "still-pending" (11a). After petitioner filed his petition for rehearing in the court below, he was acquitted at the obstruction of justice trial, at which he testified on his own behalf (13a).

Reasons for Granting the Writ

This petition presents significant and fundamental issues relating to the administration of criminal justice: (1) the extent to which an accused can be present with his attorney at all stages of the proceeding and (2) the extent to which other crimes evidence can be utilized under the little-analyzed doctrine of consciousness of guilt. Review of the questions presented is called for (1) because the decision of the Court of Appeals justifying the absence of petitioner and his lawyer from a portion of the proceedings is in conflict with the decision of another Court of Appeals on the same matter and with applicable decisions and a rule of this Court and (2) because the decision of the Court of Appeals justifying the use of other crimes evidence through the consciousness of guilt doctrine is in conflict with developing principles of the decisions of this Court.

I.

The unconstitutional procedure of excluding petitioner and his lawyer from the juror examination procedure relating to the motion for mistrial was prompted by the trial judge's mistaken notion that he was following the procedure approved in *Marshall* v. *United States*, 258 F.2d 94, 97 (10 Cir. 1958). By affirming the trial court's exclusion of petitioner and his lawyer, the Second Circuit rendered a decision in direct conflict with the Tenth Circuit decision in *Marshall*—the very case it appeared to be following.

This is the manner in which the conflict arose:[2] when the publication of the news article resulted in the defense

[2] While the Government argued strenuously in the court below that the procedure followed by Judge Murphy was "by agreement

request for a mistrial in this case, Judge Murphy suggested to the Government that he utilize "the procedure that the judge out West followed" (Govt. App. 30a), "the judge in the Tenth Circuit—the *Marshall* case" (Govt. App. 31a). But, Judge Murphy was mistaken about the Tenth Circuit's procedure and the Government, by its misplaced reliance on this Court's opinion in *Marshall* v. *United States*, 360 U.S. 310 (1959) (Govt. Br. 12), led the Second Circuit into the same misconception (8a). But this Court's opinion in *Marshall* was unrelated to the procedural point of whether an accused and his lawyer can be present when questioning jurors concerning publicity. This Court found the publicity prejudicial and reversed, without the need to comment on the procedural point. And the Tenth Circuit opinion in *Marshall* approved a procedure exactly opposite the one used here and now sanctioned by the Second Circuit. Noted the Tenth Circuit, "the trial court separately interviewed, *in the presence and with the assistance of counsel*, each of the jurors and thereafter denied a motion for mistrial." *Marshall* v. *United States*, *supra*, 258 F.2d at 97 (Emphasis added).

Not only is the Second Circuit in conflict with the Tenth Circuit on this precise procedural point by its misinterpretation of *Marshall* but it has also ignored applicable decisions of this Court. By sanctioning the trial judge's interrogation in the absence of petitioner and his lawyer,

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of *all counsel*" (Govt. Br. 11) (emphasis in original), the Second Circuit correctly observed that the procedure followed was "with Palmieri's counsel's express consent . . ." (8a). The record discloses no consent by petitioner either that he personally be absent or that the interrogation be conducted without the assistance of his counsel (Govt. App. 34a). No waiver can be inferred from this silent record. *Burgett* v. *Texas*, 389 U.S. 109 (1969).

the court below denied petitioner what this Court has recently called "one of the most basic rights guaranteed by the Confrontation Clause . . . the accused's right to be present in the courtroom at every stage of his trial," *Illinois* v. *Allen,* 397 U.S. 337, 338 (1970), and his long recognized right to the assistance of "the guiding hand of counsel at every step in the proceedings against him." *Powell* v. *Alabama,* 287 U.S. 45, 69 (1932).

As to petitioner's right to counsel, this Court explained in *United States* v. *Wade,* 388 U.S. 218, 224-226 (1967), "the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial." Certainly, an examination of jurors during the course of a trial—where need to determine prejudice in an adversary proceeding is apparent—occurs at no less a significant stage than a pretrial situation involving a police line-up, as in *Wade.*

As to petitioner's right to be present, this Court found error in *Hopt* v. *Utah,* 110 U.S. 574 (1884), when the juror examination for cause took place with defense counsel but in the absence of the defendant, even though the defendant had failed to object to the procedure. Noting that "the defendant's life or liberty may depend upon the aid which by his personal presence, he may give to counsel and to the court," and that "the necessities of the defense may not be met by the presence of his counsel only," the court held that if the defendant be deprived of his life or liberty without being present, "such deprivation would be without that due process of law required by the Constitution." 110 U.S. at 579. A similar result was reached in *Lewis* v.

United States, 146 U.S. 370, 376 (1892), where the record did not affirmatively disclose that the defendant had been afforded his "substantial rights . . . to be brought face to face with the jurors."

The view of the court below also runs afoul of Rule 43, F. R. Cr. P., which implements the constitutional mandate and commands the presence of the defendant "at every stage of the trial including the impaneling of the jury," as well as the new ABA MINIMUM STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS, approved Draft, March 1968 §3.5 (f), which adds a change to the tentative draft, and provides that when jurors are questioned about exposure to potentially prejudicial material in the course of the trial, "the examination shall take place in the presence of counsel."

Moreover, the trial judge compounded the evil of excluding petitioner and his lawyer during the examination of jurors by refusing to indicate whether any of the jurors had even read the news article which prompted the mistrial motion. Counsel was prevented from arguing the significance of the subliminal impact of the publicity upon the jurors' minds: that "unconscious effect of extrajudicial reports seems far too great to be ignored." ABA MINIMUM STANDARDS FOR CRIMINAL JUSTICE RELATING TO FAIR TRIAL AND FREE PRESS, Tentative Draft 66 (1966).[3]

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[3] One commentator has noted that in *Marshall* and *Janko* v. *United States*, 366 U.S. 716 (1961), sum. rev'g 281 F.2d 156 (8 Cir. 1960), this Court "seems to recognize the subliminal impact on federal juries of even a single newspaper item," Manes, *Irwin* v. *Dowd: Retreat from Reality*, 22 LAW IN TRANSITION 46, 58 (1962).

II.

The Casey testimony about the purported bribe was admitted over petitioner's objection (Govt. App. 4a, 5a, 8a) "solely as bearing on Wisniewski's consciousness of guilt", which reason was not articulated at trial (Govt. App. 4a, 5a, 8a).

To be sure, the cases and literature relating to consciousness of guilt are legion, but the consciousness of guilt doctrine—developed long before this Court gave new vitality to the Fifth Amendment—calls for keen analysis rather than mere reference to doctrine. Measured against the background of fundamental rights protected by the Fifth Amendment, the consciousness of guilt doctrine permitted the admission of the Casey testimony in a "manner that needlessly penalizes the assertion of a constitutional right." *United States* v. *Jackson*, 390 U.S. 570, 583 (1968). As applied here, the doctrine conflicts with the developing principles regarding the Fifth Amendment so as to justify this Court's use of its writ of certiorari.

The Casey testimony, in addition to being admitted against petitioner in the case at bar, formed the basis of another offense which at the time of its decision the Court of Appeals referred to as the "still pending obstruction of justice charge" (11a). Following the decision below, petitioner was acquitted on the obstruction of justice charge, after he testified in his own defense. By presenting the Casey testimony in its case in chief, the Government (1) placed undue limitation on petitioner's right to testify on his own behalf and (2) injected highly prejudicial matter through evidence which failed to meet the other crimes test in that it was very likely to rouse the jury to hostility.

What petitioner urges is that this Court review the judgment of the Court below to determine if the consciousness of guilt doctrine, as applied here, was the legal equivalent of an improper joinder of offenses. Certainly, the Government could not join the extortionate credit prosecution charges with the obstructing justice charge for trial under Rule 8(a), F.R. of Cr. P., since the offenses are not of the same character, based on the same transaction, or part of a common scheme. Such an impermissible joinder of offenses is inherently prejudicial requiring severance as a matter of law. 8 MOORE'S FEDERAL PRACTICE ¶8.04 (2d Ed. 1970). Even assuming, *arguendo*, the offenses could be joined under Rule 8(a), petitioner would be entitled to a severance as relief from the prejudicial joinder under Rule 14, F.R. Cr. P.

What the court stated in *Cross* v. *United States*, 335 F.2d 987, 989 (D.C. Cir. 1964) is equally applicable to the present case:

> "Prejudice may develop when an accused wishes to testify on one but not the other of two joined offenses which are clearly distinct in time, place and evidence. His decision whether to testify will reflect a balancing of several factors with respect to each count: the evidence against him, the availability of defense evidence other than his testimony, the plausibility and substantiality of his testimony, the possible effects of demeanor, impeachment, and cross-examination. But if the two charges are joined for trial, it is not possible for him to weigh these factors separately as to each count. If he testifies on one count, he runs the risk that any adverse effects will influence the jury's consideration of the other count. Thus he bears the risk

> on both counts, although he may benefit on only one. Moreover, a defendant's silence on one count would be damaging in the face of his express denial of the other. Thus he may be coerced in testifying on the count upon which he wished to remain silent."

The court in *Cross* implied that the privilege against self incrimination permitted Cross to remain silent on one count and that testimony on the other count was not a waiver of the privilege. The present situation is even more prejudicial since the trial court below could not have allowed petitioner to refute the bribery charge, upon which he was ultimately acquitted after he testified, without a waiver of his Fifth Amendment privilege with respect to the charges on trial.

The inevitable result of allowing the witness Casey to testify in the present case was to force petitioner to surrender his Fifth Amendment privilege on one charge in order to protect his right to testify on his own behalf on the other charge or to forego his right to testify on his own behalf on the Casey claimed bribe in order to preserve his Fifth Amendment privilege relating to the charges on trial. This runs afoul of this Court's admonition that an accused may not be compelled to surrender his Fifth Amendment right to protect another right. *Spivak* v. *Klein,* 385 U.S. 511 (1967); *Garrity* v. *New Jersey,* 385 U.S. 493 (1967); *Gardner* v. *Broderick;* 392 U.S. 273 (1968).

Conclusion

For these reasons, then, this Court should—and petitioner requests that it does—issue its writ of certiorari to review the judgment of the court below.

Respectfully submitted,

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March 14, 1972.

APPENDIX

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 337, 359, 362—September Term, 1971.

(Argued December 10, 1971 · Decided February 9, 1972.)

Docket Nos. 71-1744, 71-1741, 71-1743

UNITED STATES OF AMERICA,

Appellee,

v.

JOHN PALMIERI, JOSEPH A. TRAVISANO and LEONARD WISNIEWSKI,

Appellants.

Before:

ANDERSON, MULLIGAN and OAKES,

Circuit Judges.

Appeal from judgments of conviction after a jury trial in the United States District Court for the District of Connecticut, Thomas F. Murphy, *Judge*, for violation of 18 U.S.C. §§892, 894 and for conspiracy to violate those sections.

Affirmed.

SIGMUND L. MILLER, Bridgeport, Conn., *for Appellant Palmieri.*

A. JAY SPRECHER, East Haddam, Conn., *for Appellant Travisano.*

WARREN A. LUEDECKER, Bridgeport, Conn., *for Appellant Wisniewski.*

LESLIE BYELAS, Assistant United States Attorney, Bridgeport, Conn. (Stewart H. Jones, United States Attorney for the District of Connecticut, George F. McGunnigle, Jr., Assistant United States Attorney, of counsel), *for Appellee.*

OAKES, *Circuit Judge:*

This appeal is from convictions in connection with an avaricious ($9,975 collected on a $5,000 loan for four months) loan-shark extortion of two small businessmen in Bridgeport, Connecticut.

All appellants were convicted on the count charging conspiracy to participate in the use of extortionate means, *i.e.*, threatening use of violence, to collect the extension of credit. Appellants Wisniewski and Palmieri were also convicted on two substantive counts, one charging the making of an extortionate extension of credit (18 U.S.C. §892; hereinafter the "making" count), and the other charging the use of extortionate means to collect an extension of credit (18 U.S.C. §894; hereinafter the "collecting" count). Appellant Wisniewski doesn't argue sufficiency of the evidence; he claims that a front page newspaper story published during the trial prejudiced the jury and that $15,656.99 in cash taken from him on arrest and not shown to be connected with the charges here should be returned. The story described Wisniewski's arrest during the trial for obstructing justice by bribing and threatening the government's chief witnesses, the extortion victims. That arrest was followed by the testimony of one Casey to the unsuccessful bribery and threats.

Appellant Palmieri doesn't argue sufficiency on the conspiracy or collecting counts but does on the making count. He also argues jury prejudice and makes the additional claim that Casey's testimony about Wisniewski, admitted only against Wisniewski, contained prejudicial hearsay concerning Palmieri and thus was inadmissible under *Bruton* v. *United States*, 391 U.S. 123 (1968).

Appellant Travisano argues insufficiency on the conspiracy count especially in light of his acquittal on the substantive counts; he also joins in the newspaper publicity argument and claims that the admission of certain testimony of Casey's was plain error as to him and violated his due process and sixth amendment rights.

The victims of the alleged extortion, Messrs. Suli and Secchiaroli, became partners in a floor covering business in Bridgeport eventually incorporated under the name of Town Floor Distributors, Inc. To secure Secchiaroli's interest in the business, he borrowed $5,000 from Wisniewski, a sometime auto salesman, who told him—even before the loan was consummated—that it "had to be paid back or else." The loan was consummated on December 31, 1969, in the office of Wisniewski's attorney (who tried the case and argued this appeal). By its terms the loan was for seven months, and although interest was not mentioned on the face of the note, it was understood by Suli and Secchiaroli to be $1,000 or 20 per cent. (Unless our mathematics is wrong even that is over 34 per cent per annum.) The partners decided they wanted to pay the loan in a hurry, however—as Secchiaroli testified, "Las [Suli] was just as scared as I was"—and they tried to make payment with a $6,000 check on January 30, 1970. This check was purposely drawn on insufficient funds because the partners figured that "if the check bounced" they "would have to answer to the bank, which was a lot easier than answering to Mr. —."

In February 1970, Wisniewski informed Suli that $1,000 interest was owed for the month of January and telephoned several times during February for the payment. On February 16, 1970, the telephone calls were successful, for Suli paid Wisniewski $1,275 by check.

About a month later at the floor covering shop Wisniewski informed Suli that there was "another interest due on the loan" and that "[t]he people who lended the money, they want their money. They want the money repaid." That same afternoon "John," appellant Palmieri, came back to the shop with Wisniewski, and they demanded another interest payment; "John" in a "mad" tone of voice said it was his money, that he wanted to get paid and, as Secchiaroli testified, it must be paid "or he'd hang us from the rafters."[1] Wisniewski, good fellow that he was, clinched the argument, telling Suli that he was "a nice guy" and he didn't "want to see [him] get hurt." Secchiaroli sold $1,940 of floor tiles for $1,000 to pay Wisniewski, but on Suli's objection to this Secchiaroli gave the $1,000 to his own attorney to hold. Suli even had his partner charged with embezzlement, a charge which was *nolle prossed.*

Travisano entered the picture for the first time in early April when he went to Secchiaroli's house to ask him why the loan had not been paid, saying he "was there to check on it for someone"—"someone" in this connotation may have sounded ominous—and asking him what happened to the $1,000. When Secchiaroli told Travisano that the $1,000 was at the attorney's, Travisano didn't believe him and even accompanied the victim to the attorney's office, verified the fact and then telephoned Wisniewski to confirm that the attorney had the money. Thereafter Travisano placed col-

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1 The statute defines both an extortionate extension of credit and use of extortionate means as involving use or threats of use of "violence or other criminal means." 18 U.S.C. §891(6), (7).

lect telephone calls to Secchiaroli several times a day about the loan.

At the end of April all three appellants arrived at Town Floor Distributors. Wisniewski told the partners they now owed $8,700 because they were "behind" in their payments. The partners relinquished tile worth $8,700 at wholesale in payment of the debt, and Wisniewski, Palmieri and Travisano loaded it in a truck and removed it to Wisniewski's garage. Together with the previous payment of $1,275, this made up the total of $9,975 paid on the original $5,000 loan.

The foregoing demonstrates that there was ample evidence to justify Palmieri's conviction on the making as well as the collecting count. While the statute requires that in making an extortionate extension of credit there must be "at the time it is made" an understanding of the creditor and the debtor that delay or failure in repaying the loan "could result in the use of violence or other criminal means," 18 U.S.C. §891(6), Wisniewski originally told Secchiaroli that "he couldn't make a decision right there," "he would have to talk to someone and let me know." Palmieri later let it be known that it was his money that had been loaned. Even before the making of the loan Wisniewski threatened repayment "or else." While Palmieri's name had not been mentioned on December 31, 1969, from his subsequent claim to ownership of the money lent and threats to hang the victims it could be inferred that he was a participant in the original extension of credit.

There is ample evidence of Travisano's participation—by telephone calls, the rather remarkable trip to Secchiaroli's lawyer's office and the telephone call placed there to Wisniewski, as well as his assistance in loading the tile to take it in satisfaction of the debt—to justify his conspiracy conviction. His suggestion on oral argument that he was

merely being "friendly" to Suli and Secchiaroli would be risible if the charge were not so serious. With friends like Travisano, Suli and Secchiaroli had no need of enemies. Travisano's legal argument, however, that his acquittal on the substantive counts is inconsistent with his conviction on the conspiracy count, rises to a somewhat higher plane. It may have been that the jury thought there was insufficient evidence to show that he actually lent the money or shared in the proceeds, even though he helped collect them. Or the jury may well have thought that Travisano, without using threats of violence himself, helped make Secchiaroli afraid of Wisniewski and Palmieri. As a matter of law ". . . acquittal on a substantive charge does not prevent a conviction for a conspiracy to commit the offense substantively charged unless the necesssary proof on the substantive charge is identical with that required to convict on the conspiracy count." *United States* v. *Fassoulis*, 445 F.2d 13, 18 (2d Cir), *cert. denied*, 40 U.S.L.W. 3165 (U.S. Oct. 12, 1971). *See also Pereira* v. *United States*, 347 U.S. 1 (1954). Although the jury could have convicted Travisano on the substantive count as an aider and abettor, it chose to convict him only on the conspiracy count. Absolute consistency in the verdict is in any event not required. *United States* v. *Taller*, 394 F.2d 435 (2d Cir.), *cert. denied*, 393 U.S. 839 (1968); *United States* v. *Costello*, 221 F.2d 668 (2d Cir. 1955), *aff'd on other grounds*, 350 U.S. 359 (1956). Here no substantial inconsistency appears.

Consequently, all three appellants rely most heavily on the claims of prejudicial publicity, allegedly received from the newspaper story published during the trial, and the trial court's handling of that publicity. That article appeared in the *Hartford Courant* on Saturday, May 29, 1971. It told of Wisniewski's arrest outside the courtroom on Friday, May 28, and his being charged with bribing and

threatening a government witness. It described the witness Casey's testimony on Friday. Interestingly enough, if the witness Casey is to be believed—and he turned himself in to the United States Attorney—Wisniewski himself brought the story about. According to Casey, whose testimony was admitted solely as bearing on Wisniewski's consciousness of guilt, Wisniewski told him on Wednesday night, May 26, 1971, after two days of trial, to go see Suli and Secchiaroli; that he had $10,000 to split between them; that they should say they received $7,600 of loans; that if it were not for him (Wisniewski), "they would have been pushing up daisies six months ago. Slu,* or John, was going to have them taken care of"; and that "Slu or John" was Palmieri.

The newspaper article went on to describe Suli's and Secchiaroli's testimony, the charges, the fact that charges against a fourth defendant (one Marangelli) had been dismissed by the trial judge, and it mentioned that all four defendants had been arrested (on these charges) by the FBI in 1970 and that Palmieri was later arrested by New York State authorities on a parole violation and was in custody of Greenhaven, New York, correctional officials. The article concluded by noting Casey's and Wisniewski's arraignments on obstruction of justice charges.

Wisniewski is in no position to complain that the article was prejudicial to him, even though it was read by all the jurors. The article mentioned his arrest, but after Casey's testimony the United States Attorney would have been delinquent in his duty if he did not make an arrest and the jury cannot be supposed to have been so naive that this would make any difference to them. Wisniewski grasps at straws by arguing that the jury might have inferred that the others were guilty from the story's report that

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* Misspelled "Slew" by the *Courant* or "Slu" in the transcript.

charges as to Marangelli had been dismissed as not proved; jurors are not presumed to be stupid or unable to follow the court's rulings on the law. *See Fairmount Glass Works* v. *Cub Fork Coal Co.*, 287 U.S. 474, 485 (1933). The fact that the story disclosed that Palmieri had been arrested on some vague New York parole violation did not prejudice Wisniewski.

Similarly Travisano cannot claim prejudice from the story. That he was associated as a co-defendant with a fellow who had just been arrested for obstructing justice and another who was charged as a parole violator did appear in the story, but again the really prejudicial published matter—the alleged bribe of and threat to Suli and Secchiaroli—had already been heard by the jury through Casey's testimony.

Palmieri has more cause for complaint since his own parole violation arrest had not come out in the course of the trial. The impact of that is *de minimis*, however, since Casey had testified—without objection on Palmieri's part—that Wisniewski had said to Casey to tell the victim-witnesses, in a style Damon Runyon would have thought too stereotyped, "Slu, or John" would have had them "pushing up daisies." From that evidence and other similar evidence of Palmieri's reputation and his own "I'll hang you from the rafters" language, the jury could not have been very surprised or shocked to have learned that Palmieri was in fact on parole.

In any event, at the first convenient opportunity when court reconvened on Tuesday the trial judge attempted to cure any potential error, with Palmieri's counsel's express consent, by following the practice, *see Marshall* v. *United States*, 360 U.S. 310 (1959); *Coppedge* v. *United States*, 272 F.2d 504 (D.C. Cir. 1959), of interrogating the jurors

individually in chambers and on the record, as to whether their judgments would be affected by their having read the story. The court reminded them of their jurors' duty and the presumption of innocence, the answers being sufficient to satisfy the court that there was no real prejudice here. It may be that a preferable practice could have been followed,[3] but we are satisfied on all the evidence that any error to any of the defendants from the jurors' reading the article was harmless, *Chapman* v. *California*, 386 U.S. 18 (1967), under any test. *United States* v. *Persico*, 425 F.2d 1375, 1378-82 (2d Cir.), *cert. denied*, 400 U.S. 869 (1970) (*New York Daily News* front page headline, "CALL VALACHI IN COSA TRIAL," *inter alia*, did not prevent fair trial). *See also United States* v. *Rubino*, 431 F.2d 284 (6th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971).

Thus we turn to the claims of Palmieri and Travisano concerning Casey's testimony. Palmieri did not initially object to Casey's daisy testimony mentioned above, and the testimony of what Wisniewski had told Casey to tell

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2 The appellants do not complain of the fact that the jurors were interrogated in the absence of counsel. Palmieri complains, however, that the court would not disclose to counsel what the substance of the interrogations was. But in the atmosphere of intimidation and threats of violence permeating the evidence, particularly since Wisniewski's lawyer who had handled the original making of the loan was also trial counsel, the court may well have been concerned with possible juror intimidation.

3 Where juries are not generally sequestered (*e.g.*, Connecticut; the Southern District of New York), and the trial judge can anticipate prejudicial publicity, he might inform the jury of its duty not to read or listen to any story about the trial, tell the jurors on their oath that he will ask them on their oaths the following morning if they have read or listened to any such stories, and then do just that before starting the next day's trial. This can help eliminate the possibility of prejudice. It is a procedure that was first suggested to the author of this opinion by United States District Judge T. Emmet Clarie of Connecticut. Newspapers, of course, should not have to be reminded of their own solemn duty not to print criminal records of accused persons lest prejudice result. *See Marshall* v. *United States*, 360 U.S. 310 (1959).

the victims was received solely to show Wisniewski's consciousness of guilt.[4] *United States* v. *Tropiano*, 418 F.2d 1069, 1080-81 (2d Cir. 1969), *cert. denied*, 397 U.S. 1021 (1970), therefore governs, not *Bruton* v. *United States*, 391 U.S. 123 (1968).

Casey's testimony as to Travisano was so garbled,[5] or comes to us in such garbled fashion, that it is hard to read anything into it. We certainly see nothing that would have had a ". . . probable impact . . . on the minds of an average jury." *Harrington* v. *California*, 395 U.S. 250, 254 (1969).

Wisniewski's claim that he is entitled to the $15,000-plus in cash found on his person at the time of his arrest is premature. The money may be needed as evidence at the

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4 It is not disputed that the evidence was received solely for that purpose. *United States* v. *Freundlich*, 95 F.2d 276, 278-79 (2d Cir. 1938).

5 Q. At that time did he talk about any other people? A. Oh, about Joseph Travisano. He said—see, I got beat up, and all—.

Q. What did he say about—A. That Joe didn't—

The Court: Wait, please. Yes, gentlemen.

Mr. Luedecker: I ask that that be stricken. It's not responsive, and the ladies and gentlemen of the jury should be told to disregard it.

The Court: That's true. It is stricken and you should disregard it.

Q. What did he say to you about Mr. Travisano?

Mr. Luedecker: Same objection, if your Honor please.

Mr. Simons: I object to what he said, to what Wisniewski said about Travisano. He was not present, your Honor, and it's after the dates mentioned in the indictment. If he wants it to be confined to what Wisniewski said about Wisniewski, that's relevant and material. But anything else is not germane, not within the scope of the indictment, and the fact that it's hearsay, Travisano was not present, and he's not claiming he's present, and I think it's highly improper, prejudicial.

The Court: I'll allow it.

By Mr. Bydlas:

Q. You can answer the question, Mr. Casey. A. He said Joe Travisano, beating myself up and Mr. Sacchiaroli did that on his own [sic], Mr. Wisniewski had nothing to do with it.

trial of the still-pending obstruction of justice charge, since, according to Casey, when he allegedly told Casey to offer $10,000 to Suli and Secchiaroli to change their testimony he motioned toward his pocket, as if to indicate that the money was readily available.

Judgments affirmed.

Order on Petition for Rehearing

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

71-1741, 71-1743-44

A petition for rehearing together with a motion in the Alternative to stay the issuance of the mandate pending application for a writ of certiorari to the Supreme Court of the United States having been filed herein by counsel for the appellant Leonard Wisniewski,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

March 9, 1972

ROBERT P. ANDERSON
per J. L. C.

JAMES L. OAKES

WILLIAM H. MULLIGAN

Judgment of Acquittal

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Criminal Case #13,004
(Obstruction of justice case)

UNITED STATES OF AMERICA

vs.

LEONARD WISNIEWSKI

An Indictment charging the defendant with endeavoring to influence a witness in a Criminal Case then on trial in the discharge of his duty as such witness by the offer of a bribe in violation of Title 18, United States Code, Sections 1503, 2(a) and 2(b), having been returned, and said defendant having plead not guilty to all charges contained in said Indictment, this case came on for trial before the Court and a jury, the Honorable Richard H. Levet, United States District Judge, Sitting by Designation, presiding, and the case having been duly tried, and the jury having returned its verdict of not guilty,

IT IS ORDERED and ADJUDGED that the defendant, Leonard Wisniewski, is hereby acquitted of the charges contained in the Indictment filed in this case.

Dated at Bridgeport, Connecticut, this 3rd day of March, 1972.

RICHARD H. LEVET
United States District Judge
Sitting by Designation

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No. 71-1184

In the Supreme Court of the United States

OCTOBER TERM, 1971

LEONARD WISNIEWSKI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1184

LEONARD WISNIEWSKI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial with others in the United States District Court for the District of Connecticut, petitioner was convicted of having conspired to use extortionate means to collect an extension of credit, and of two substantive counts charging the making of an extortionate extension of credit and the use of extortionate means to collect an extension of credit, in violation of 18 U.S.C. 892, 894. He was sentenced to concurrent prison terms of five years. The court of appeals affirmed (Pet. App. 1a–11a) and denied a petition for rehearing (Pet. App. 12a).

Petitioner here relies on two contentions first raised in a petition for rehearing below. He argues: (1) that

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his right to confrontation was denied by the procedure, apparently followed without objection and with the express consent of counsel for one of the co-defendants, by which the judge interrogated the jurors *in camera* and on the record regarding the possible prejudicial effect of a newspaper article; and (2) that the introduction, limited to the issue of petitioner's consciousness of guilt, of testimony that petitioner offered to bribe victims of the extortionate conduct who testified for the government violated his privilege against self-incrimination since he was subsequently acquitted of the charges stemming from this alleged incident. Even assuming that the trial judge erred in interrogating the jurors *in camera*, petitioner has demonstrated no prejudice. See Pet. App. 7a–9a; *United States* v. *Gradsky*, 434 F. 2d 880, 884 (C.A. 5), certiorari denied *sub nom. Roberts* v. *United States*, 401 U.S. 925, and cases there cited; *Peterson* v. *United States*, 411 F. 2d 1074, 1080–1081 (C.A. 8), certiorari denied, 396 U.S. 920; *United States* v. *McNair*, 433 F. 2d 1132, 1136 (C.A. D.C.).

As to the testimony, it was plainly relevant to the charges. The fact that the testimony concerned conduct for which petitioner was later acquitted does not require a new trial. To be admissible, evidence regarding other alleged criminal conduct does not have to rise to the level of showing that the defendant engaged in such conduct "beyond a reasonable doubt"—the standard required for conviction. Cf. *United States* v. *Geaney*, 417 F. 2d 1116, 1119–1120 (C.A. 2), certiorari denied *sub nom. Lynch* v. *United States*, 397 U.S. 1028.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

MAY 1972.

U.S. GOVERNMENT PRINTING OFFICE: 1972